THE DOCTRINE OF CONSIDERATION IN BILATERAL CONTRACTS.[1]

IN a footnote to a recent article in the *Harvard Law Review*[2] on the subject of Mutuality and Consideration, Professor Ballantine said: "A similar misrepresentation was also fallen into by Dean Ashley in his article in 26 Harvard Law Review 429." This note is made to an article in which it is attempted to show that Professor Williston attributes to him[3]

> "the position that consideration is to be found in the exchange of actual performances and that it is the actual performances which are considerations for each other. What I have endeavored to show, however, is that the element of consideration or reciprocity must be found not in the actual performances nor in the promises but in the *promised performance,* i. e., in the nature, relation, and future value of the *contemplated performance.* * * * It is submitted that 'promise' here means neither the expression of assent or agreement, the promise in fact; nor the obligation which results therefrom; nor the actual performance; but the promised performance, that is the prospective value bargained for."

In the article in which I am stated to have given a "misinterpretation" of Professor Ballantine's views it was said:[4]

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[1] I cannot agree with Professors Williston and Ballantine in regretting that there exists a difference of opinion with those for whom I cherish a high respect. Professor Williston has not only a charming personality, but I regard him as worthy of the group of great thinkers who were lately his colleagues, namely, Langdell, the elder Thayer, Ames and Gray. I can think of no higher praise. Professor Ballantine I know only by his writings, but these lead me to rank him high and place him with that well known group of younger Harvard Law School graduates, among whom are found Gifford, Costigan, and others of like calibre. It seems to me that comment and criticism of expressed views is a compliment, and indicates that the subject matter discussed has merit. One does not waste time on writers who have no force or weight.

[2] 28 Harv. L. Rev. 121, 126, n. 11.

[3] 28 Harv. L. Rev. 121, 125, 126.

[4] 26 Harv. L. Rev. 429.

"Recently a thoughtful writer has given the following definition: (Dean Henry Winthrop Ballantine, Contracts, 7 Commercial Laws of the World, 81.) 'Consideration is primarily the test of bargain, and may be defined as the thing which the promisee gives or promises to give in exchange for the thing promised; not for the promise, as it is usually expressed.' To the objection that under this description only unilateral contracts are possible the writer replies: (In private correspondence) 'That is true if I grant the 16th century premise (that in all agreement there must be *quid pro quo* presently.) * * * I do not admit, however, that the contract cannot arise until the consideration is actually furnished.' And he also adds that he would amend the language in my text (Ashley, Law of Contracts, p. 65) on Contract to read, 'Consideration is something furnished *or to be furnished* to the promisor at his request and in exchange for *what he promises.*' It seems to me that this is not the generally accepted conception of consideration. As the view comes from an authoritative source it is deserving of careful examination. We are not here concerned with the origin of the doctrine. The question of importance today is as to what is now consideration and when it must be furnished. According to the idea given above, consideration is not an element of contract, because it is said that it is incorrect in bilateral contracts to speak of the exchange promise as the consideration, but rather is it the thing promised, i. e., the performance of the promise rather than the promise itself. It is well settled that the contract must arise, when bilateral, at the time the counter promise is given. If this counter promise is not the consideration, but its performance is, then the contract arises before the consideration is furnished, and we have the possibility of a contract without consideration. In other words, neither party can withdraw; and this is so whether the demanded consideration, i. e., the promised performance, is ever furnished or not. According to this view the counter promise amounts to no more than an acceptance, and there would seem to be no real difference in result between an offer calling for a unilateral or bilateral contract. In either event the contract seems to come into existence upon acceptance, and not to be delayed until performance. But if it be said that in a bilateral contract the counter promise is an obligation, but not consideration, then what is the consideration for this counter promise, and to what does it obligate? If it is the

> performance of the first promise, then each arises and becomes binding without any consideration, and there is merely the contemplation of performance as the basis of the agreement. Just what part the requested consideration may then play seems uncertain. Apparently the only method by which its enforcement could be secured would be by making it a condition precedent to the performance of the obligation contained in the promise for which it is required."

It is submitted that the various statements above quoted amply justify the views taken both by Professor Williston and myself.

But the explanation given by Professor Ballantine [5] leaves me still in doubt as to just what he does mean. He says:

> "It is submitted that *'promise'* here means neither the expression of assent or agreement, the promise in fact; nor the obligation which results therefrom; nor the actual performance; but the promised performance, that is the prospective value bargained for."

To me it appears that this language indicates that "promise" is used in the sense of "obligation," and that in spite of the statement above which reads, "nor the obligation which results therefrom," Professor Ballantine does in fact mean such obligation. This more fully appears by his statements made in the article in question. Particularly when he states,[6] "I would accordingly venture to propose a modified version of Professor Williston's definition to read as follows: Consideration is something of possible value given *or undertaken to be given in* return for something promised." With such a conclusion I have no quarrel. I have said elsewhere: [7]

> "But unless we settle first what the law means by 'promise,' there is danger of confusion. What is the test by which this can be determined? The question is not easily answered. By the term 'promise,' the law frequently indicates an obligation and then the expression is equivalent to contract. 'Promise' is often used in a lay sense to indicate that an expectation of realization is given, without meaning thereby a legal, but rather a moral, obligation. And it

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[5] 28 Harv. L. Rev. 121, 126.
[6] 28 Harv. L. Rev. 121, 132.
[7] Contract, pp. 90, 91, 92.

> is employed sometimes, even in a legal sense, as forming an element of contract, and not the obligation itself. But unless promise, in law, indicates an obligation—a contract—it appears to be nothing more than an offer, as when we say 'an offer may be withdrawn until it ripens into a promise.' In any given case where an offer calls for a promise from the offeree, does the offeror demand a moral or a legal obligation, that is, does he request acts on the part of the offeree of such a character that the law will annex an obligation? If the offeror merely asks for a moral obligation, then giving words of promise is ample consideration. In fact, stating an empty formula, such as 'I promise,' would be sufficient, if requested and given as consideration. But in the average case, when a man makes an offer contemplating a juristic act and asking for a promise, he means a legal obligation. His intention is a question of fact, and there may be cases where it is reasonable to find that a moral obligation is intended. * * * But it would seem there should be clear and strong evidence of this, and that without such evidence the word 'promise' means 'contract.' "

I see no reason to change the views there expressed, and it is submitted that the confusion arises from this dual use of the word "promise."

I have said heretofore:[8]

> "I must confess that the suggested difficulties have never impressed me. We start out with the technical requirement of consideration, something which must be given in exchange for a promise in order that it shall exist in law. Suppose the consideration asked in the offer is an act. Then there can be no promise until the act is completed, even though there may be mutual assent. But suppose the act is a bond under seal. Then when the bond is delivered the offer ripens at once into a promise but not an instant earlier. At that precise point the requested consideration is furnished. In that case, however, the bond is complete by itself, and comes into existence without consideration. Let us see whether this makes any difference. When a promise is demanded, we have in reality an act requested. This act consists in giving something to which the law will annex the obligation of promise. Unlike the bond, the

[8] 26 Harv. L. Rev. 429, 433.

promise, to exist, must have its consideration, which is to be the counter promise. The instant one utters words of such a character as to constitute a promise if the element of consideration is found, the person so speaking has done his part towards giving the act asked, and it simply remains for the law to annex its obligatory character to it. At that point both parties put themselves where the law can act upon them. There appears to be no logical difficulty in saying that the law operates simultaneously upon each and thereby transforms each action into a promise, each mutually dependent upon the other. In all cases there must be some instant at which the law takes effect. This is so in the case of any obligation. A bond becomes such at the instant of delivery. Prior to that it is a mere paper writing. So each promise becomes an obligation when the action of each party makes it possible for the law to act upon each."

Professor Ballantine criticises this statement as follows:[9]

"Professor Ashley states in his recent article (26 Harv. L. Rev. 433) 'I must confess that the suggested difficulties have never impressed me. * * * There seems to be no logical difficulty in saying that the law operates simultaneously on each and thereby transforms each action into a promise, each mutually dependent on the other. In all cases there must be some instant at which the law takes effect.' Yes, but as Professor Ashley says, in the same paragraph, refuting his own contention, 'the law refuses to annex the obligation of a contract to acts of the parties which lack this essential element' of consideration. The element of consideration must be found before the law can act on the promises. One promise cannot fertilize another with consideration until it is itself fertilized. To make them act simultaneously is simply to attempt, by a sort of parthenogenesis, to make each promise indirectly fertilize itself. Like the 'loop the loop,' you go around the circle so fast that you don't fall out or notice what has happened.

"According to the premise assumed by Professor Ashley, Professor Langdell and other learned theorists, the law cannot operate on either promise to annex an obligation until the element of consideration is actually furnished, and yet by their theory the element of consideration is not furnished until the law has operated. Why should the law

[9] 11 Mich. L. Rev. 423, 431.

> operate on both promises simultaneously any more than on either one alone until the consideration is furnished? The elements on which Professor Ashley insists are not yet present to set the law in motion, and still he would get around this by making the promise become binding all in a flash and generate their own consideration in the instant of becoming binding."

The arguments are here repeated in order that the reader may draw his own conclusions. I do not, however, see how there is any arguing in a circle in such cases. I understand the contention of Professor Williston,[10] but I do not agree with it. I fail to see how my statement that "the law refuses to annex the obligation of a contract to acts of the parties which lack this essential element" (i. e. of consideration) refutes my argument. The offer in proposed bilateral contracts seems to me to call for an obligation in the form of a promise on the part of the offeree as a consideration. Until such obligation is given there is no contract. The offer does not ripen into a promise until consideration is furnished. All may not agree as to the instant when this point is reached, but once find that the obligation is given, then there is no difficulty. Professor Ballantine says: [11]

> "One promise cannot fertilize another with consideration until it is itself fertilized."

If this means that an obligation on one side must exist *before* it can be consideration for the other, it is submitted that the statement is not correct. It is contended that the two propositions, the offer and acceptance can fertilize one another at the same instant and thus each then become an obligation. The figure of of fertilization illustrates my argument, because certainly fertilization, in most cases, becomes productive only when each agent reaches the other. In other words the germ of life comes from the instantaneous commingling. The semen is only potential on either side until the second of contact. So with offer and acceptance in these cases. Each has mere potentiality until it is fertilized by the other. The consideration asked for on each side

[10] 8 Harv. L. Rev. 27; 27 Harv. L. Rev. 503.
[11] 11 Mich. L. Rev. 423, 431.

is an obligation. Until this is present there is no contract, but there is nothing to prevent each being furnished at the same instant.

Farther on in the same article Professor Ballantine seems to confuse performance with consideration. As to the former we have conditions which regulate such performance, but there must first be a contract before such questions can arise. In consideration, we have an element of contract. It is not merely a test as to whether a contract exists, but it is an element itself. Either Professor Ballantine has modified his views in his last article [12] or he has expressed himself in his former writings in language which has caused Professor Williston and myself to misunderstand him totally. Professor Williston argues that [13]

> "An offeror contemplating the formation of a bilateral contract says nothing of obligations and asks only a promise in fact. Whether the offeror has bound himself by an obligation, and whether he has got one in return is for the law to decide."

If the law decides that no obligation is given in return, then there is no consideration and hence no contract. But is not that the same as saying that the offeror when he asks for a promise means one that is binding? Suppose the offeror sues the offeree upon the claimed contract or the offeree does the same. Imagine the defence to be no contract because no consideration. The law will decide the question and may find for the defendant on the ground that no consideration exists, i. e., the offeree has not received what he asked for namely a promise, or in other words an obligation. The mere utterance of words is not desired, but a binding promise, and the law must decide in disputed cases whether in fact that which has been given is what was demanded. Whether one speaks of a promise or defines the effect of such promise as an obligation seems to be immaterial. There must be given something from which one cannot withdraw, whatever the consequences may turn out to be. If the law decides in

[12] 28 Harv. L. Rev. 121.
[13] 27 Harv. L. Rev. 503, 506.

any given case that there is no obligation, then the conclusion must be that the supposed promise was not in fact given because the defendant asked for an obligation, and not mere words of promise. It seems to me that Professor Williston shows by his statement that the counter promise is necessarily an obligation by its own force, and that he does not change this by pointing out the undoubted fact that the law must ultimately determine, if appealed to, whether such promise, i. e. obligation, was in fact given.[14]

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[14] There are certain fundamental ideas which are common to all systems of laws. In such cases the reflection of eminent men are important to all thinkers the world over. Therefore the thoughts of foreign jurists upon such general topics as mutual assent are valuable. These views have been accepted by writers on legal topics without demur. In fact the attention given in modern times to "comparative law" is based among other things upon the advantages to be gained by the study of the thoughts of others upon these very points. Recently Williston has apparently criticised the above ideas and says (27 Harv. L. Rev. 506, n. 13)

> "The statement of Savigny which has been popularized for English and American lawyers by Sir Frederick Pollock and others, that an intent to form a legal relation is a requisite for the formation of contracts cannot be accepted. It may be good Roman law but, if so, it shows the danger of assuming that a sound principle in Roman law may be successfully transplanted. Nowhere is there greater danger in attempting such a transfer than in the law governing the formation of contracts. In a system of law which makes no requirement of consideration, it may well be desirable to limit enforceable promises to those where a legal bond was contemplated, but in a system of law which does not enforce promises unless a price has been asked and paid for them, there is no necessity for such a limitation and I do not believe it exists. The only proof that it does will be the production of cases holding that though consideration was asked and given for a promise it is, nevertheless, not enforceable because a legal relation was not contemplated. If, however, the parties in effect agree that they will not be bound, this like any other manifested intention will be respected."

But does not the law require such intent, or that which the law regards as equivalent thereto, namely conduct reasonably indicating such intent? I have said elsewhere: (Contract, p. 13)

> "As the agreement of the parties is the first requisite, there must be the intent by both to enter into the proposed arrangement."

It is true that the law annexes the obligation, but it will not do so unless the parties have previously taken certain steps as a prerequisite to such obligation, and one of these is agreement which involves intent. Williston shows this when he says:

The same result necessarily follows when there is no dispute as to the validity of the claimed consideration but it is denied that it was ever given. If the plaintiff ultimately succeeds it is because there is a contract, and that settles the fact in dispute, namely, whether the consideration was given or not. Until that is determined the question whether a contract exists must be subjectively in doubt. Whether a promise in the legal sense has been given must remain in doubt when disputed, until the law settles the question whether an obligation was or was not given.

That the courts have not always been consistent is doubtless true. Thus, in the case of Holt *v.* Ward Clarencieux [15] the defendant was undoubtedly right. He set up as defence the fact that plaintiff was an infant and could not bind himself by a contract, and therefore could not furnish the consideration asked. The fact that he was overruled by no means shows that his contention was not correct. A given decision may settle the rule of law while it stands, but it may nevertheless be unsound. If we are to regard law as a science, most questions must be susceptable of determination and the correct solution cannot depend upon whether a given judge is mentally or educationally capable of a correct solution.

For these reasons the citation of instances contrary to the conclusion which is contended to be correct does not necessarily in-

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"If however the parties in effect agree that they will not be bound. this like any other manifested intention will be respected."

That a party indicating such intent may "not intend to be individually responsible" or does "not know or believe as matter of law" that he will be liable is clearly immaterial, but the intent to enter into a business arrangement or juristic relation is essential. There must be intent, i. e. agreement, to contract as an essential element, and if such element is found to be lacking the law does not annex the obligation. Professor Williston has himself said: (Williston's Wald's Pollock, p. 3, n. 1.)

"If the parties intend by an agreement merely a joke or banter, there will be no contract"

and he cites well known authorities therefor. It seems clear that there must exist between the parties the intent to contract and that Pollock is justified in accepting Savigny's statement as correct when applied to our own law.

[15] 2 Str. 937.

dicate anything more than illogical exceptions which perhaps may stand on the theory of *stare decisis,* but are nevertheless wrong.

It may, of course, be argued that the exceptions are really accurate statements of the rule and that all decisions in conflict therewith are wrong. One contention or the other must be correct. This seems to turn upon a question of fact. For instance, does a man when he asks for a counter promise want an obligation or a mere moral promise? To me it seems clear that he desires to bind the promissor in some other forum than that of conscience and that an obligation is sought.

Professor Williston points out in the above mentioned article [16] that

> "Whatever may be the character of the thing promised, a promise will be of no value unless it is binding;"

i. e. the promise must be an obligation. Hence one who lacks capacity to contract is unable to obligate himself and hence cannot promise, because the law will not attach the obligation of contract to his action. Hence he is not able to give the consideration required, and no contract arises.

In writing upon the doctrine of consideration Professor Ballantine says: [17]

> "The courts have not felt compelled to extend a remedy to one who seeks to get something for nothing."

It is believed that this is not the true theory of consideration.[18] The court does not weigh the value of the consideration requested, and looks only to see whether there is any value no matter how slight.[19] A consideration is often named in order to comply with legal requirements, although it is quite evident that a gift is intended. The court does not inquire as to the motive, but merely insists upon the requirement being met. It is not

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[16] 27 Harv. L. Rev. 503, 525.

[17] 28 Harv. L. Rev. 121.

[18] See, for instance, Bainbridge *v.* Firnstone, 8 A. & E. 743; Wilkins *v.* Oliveira, 1 Bing. (N. C.) 490.

[19] Foakes *v.* Beer, 9 App. Cas. 605.

probable that Professor Ballantine would disagree with this, but his statement is liable to mislead.[20]

Contract arrangements enter into the life of most people. The average lawyer thinks that he is well posted on this topic at least. As a matter of fact it is remarkable how many are ignorant of all but the rudiments of the subject. Thus, we all lay down the postulate that the English law requires consideration for a simple promise and that in our law a gratuitous promise is not enforceable. Yet in reality, in every day life we know that this is not necessarily so. In the first place a solvent man may confessedly give away anything he owns except his promise. We say he cannot make a gift of this. Within reason we know that this is based upon sound grounds. But does this require our technical doctrine of consideration? It would seem not, because where the rule becomes too inconvenient the courts refuse to enforce it, dodging the issue by pure fictions or by illogical and perfectly absurd reasoning.

But the possibility of gratuitous promises is illustrated by covenants at the common law. Then we have the numerous exceptions which have been frequently pointed out. Again there are the cases where a really gratuitous promise meets the requirement of giving something of no real value to the promisee. Then the courts say the law cannot measure the adequacy of the consideration.

We can easily understand the history of these rules and just how the present situation developed, but when it comes to applying them the difficulties arise.

In any given case turning upon the question of consideration, how shall the practising attorney advise his inquiring client? The business man is entitled to know whether he has a contract or not. Yet the rule which ought to be simple turns out to be ex-

[20] Professor Ballantine says: (29 Harv. L. Rev. 121, 123) "To Professor Williston belongs the credit of having pointed out the question begging fallacy in Langdell's theory." The suggestion was first made in Anson's Contracts (1st ed.) 80. Williston says: (8 Harv. L. Rev. 34) "Sir William Anson, however, pointed out a fallacy in this kind of reasoning in that it assumes that the second promise does impose an obligation upon the promissor."

tremely complicated. Langdell, Pollock, Anson, Ames, Williston, Ballantine and many others find it worth while to write again and again upon this one topic, and most of these eminent thinkers differ on one or more points.[21] Why should not the entire rule be frankly abolished? Not by fictitious and absurd arguments but frankly and distinctly. There must exist somewhere that *rara avis,* a judge who really understands the learning of the law of contract while possessing the courage of his understanding and the ability to express himself clearly. Such a judge could seize a suitable case to decide that the only requirement, as far as so-called consideration is concerned, is mutual agreement, with the intent (or reasonable appearance thereof) to bring about a juristic act. There would be no great difficulty in applying such a test. The New Jersey courts do it without trouble in their interpretation of their statute modifying sealed instruments.[22] But if this is too much to expect from any existing court then suitable legislation could enact that the rule as to technical consideration be abolished and the test be simply as to the intention of the parties. Professor Ballantine says:[23]

> "In a recent article Dean Ashley takes the somewhat paradoxical position of being at the same time counsel for the defense and also prosecutor of the doctrine of consideration. While defending it against various relaxations and modifications which have been suggested to accomplish more rational and just results, which he denounces as subterfuge and unwarranted usurpation of legislative power by the courts, he also, as it were, saws off the branch he is sitting

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[21] I find myself pilloried with Langdell by Williston (27 Harv. L. Rev. 506, n. 10) for claimed erroneous thinking, and by Ballantine (28 Harv. L. Rev. 124), with Pollock and Langdell. While I am flattered at being classed with these distinguished authorities, and might almost be willing to err in such company, yet I submit that there must be something wrong in a rule that admits of so many doubts and such divergent views. Williston says: (Williston's Wald's Pollock, p. 201, n. 14).

> "There has been much difference of opinion on the elementary question of the essential element of considerations in bilateral contracts."

I still think that the use of the legal fiction "detriment" in discussing consideration leads to confusion of thought and should be avoided.

[22] Allen *v.* Allen, 40 N. J. Law. 446.

[23] 11 Mich. L. Rev. 423.

> on, by contending that the time has now come, either for the courts themselves to overrule the entire doctrine, or for the legislature to act and by a brief statute declare that the doctrine of consideration is hereby abolished."

I do not see the force of this criticism. One may not approve a rule and contend that the law would be improved by its abolition, while he consistently argues that illogical attempts to dodge it are unwarranted. If the branch is rotten saw it off by all means, but do not attempt to preserve it by patching it up for the time being, although leaving the rotten limb still there.

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